

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
FIRST REGION**

In the Matter of

BIG Y FOODS, INC.

Employer<sup>1</sup>

and

UNITED FOOD & COMMERCIAL WORKERS  
INTERNATIONAL UNION LOCAL 1445, AFL-CIO, CLC

Petitioner

Case 1-RC-21599

**DECISION AND DIRECTION OF ELECTION**<sup>2</sup>

This case presents the question of the supervisory status of the meat department managers employed by Big Y Foods, Inc., which operates a chain of grocery stores. United Food & Commercial Workers Local 1445 (Union) seeks to represent a bargaining unit composed of about 30 meat department employees, including meat department managers, employed at five grocery stores operated by Big Y.<sup>3</sup> Big Y contends that the

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<sup>1</sup> The Employer's name appears as amended at the hearing.

<sup>2</sup> Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

<sup>3</sup> At the outset of the hearing, Big Y took the position that the smallest appropriate unit must include the meat department employees in the sixteen stores that comprise its eastern district. After several days of hearing, however, Big Y stipulated to the appropriateness of the five-store unit sought by the Union.

meat department managers are statutory supervisors who must be excluded from the unit, on the basis of their authority to assign work, schedule employees, hire, evaluate, discipline, and effectively recommend promotions. The Union seeks contends that they are nonsupervisory employees. I find that the meat department managers are Section 2(11) supervisors and shall exclude them from the unit.

### Background

Big Y operates 47 grocery stores in Massachusetts and Connecticut, which are grouped into three geographic districts. The Union seeks to represent the meat department employees at five of the sixteen stores in the eastern district. The petitioned-for stores are all located in central Massachusetts, in Southbridge, Spencer, Holden, on May Street in Worcester and on Sunderland Road in Worcester.

Big Y is owned by the D'Amour family. Director of Operations William Hogan reports to Big Y's vice president for operations. Each of the three districts has a district manager, and Mike Galat is the district manager for the eastern district. Each store has a store manager who reports to the district manager, and some stores have an assistant store manager. Within each store, the various department managers, including the meat department managers, report to the store manager.<sup>4</sup>

The meat department managers at issue are Roland Bosse in Southbridge, Paul St. Pierre in Holden, Doug Jablonksi in Spencer, Joe Ricardi in Worcester/Sunderland Road, and Joe Nowak in Worcester/May Street.<sup>5</sup> Each meat department consists of a meat department manager, an assistant meat department manager,<sup>6</sup> meat cutters, and full-time and part-time meat clerks. There are five to seven employees in each meat department, including the meat department managers.

Big Y's human resources function is overseen by Employee Service Field Manager Laurie Hebert. Employee services specialist Michelle Crawford, who reports to Hebert, is responsible for human resources for the stores in the eastern district. Each store has a training and development manager (TDM) who plays a role in human resources as well.

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<sup>4</sup> There is also a night manager who reports to the store manager.

<sup>5</sup> Bosse served as the meat department manager in Holden from January 2001 through January 2003, when he transferred to Southbridge. St. Pierre was the meat department manager in Southbridge for one year before becoming meat department manager in Holden in January 2003. Jablonski has been a meat department manager for more than ten years, Ricardi for three to four years, and Nowak since January 2003. Ricardi served as meat department manager in Holden for four and a half years before assuming his current position in Worcester/Sunderland Road.

<sup>6</sup> Not all stores have an assistant meat department manager. Both parties take the position, and I find, that the assistant meat department managers are nonsupervisory employees.

### Authority to assign work

The meat department in each grocery store has a fresh meat case, a frozen meat case, and a case for packaged meats such as bacon and hot dogs. Each meat department has a cutting room in the back of the store where meat cutters cut the fresh meat for the day. Meat department clerks are responsible for waiting on customers, wrapping the meat, filling the meat cases from racks of meat cut by the meat cutters, grinding hamburger, and cleaning up at the end of the night.

Meat department managers inspect the meat cases to determine whether or not additional items are needed. They may assign a meat clerk to fill a case with a particular item or to check the expiration dates of the meat in the cases. Meat clerks also receive directions from meat cutters, who are usually more experienced employees.<sup>7</sup> Each night, the meat department managers fill out a communication log, in which they leave a list of tasks to be done by the employees who man the department after the manager leaves for the day.<sup>8</sup> The assistant meat department managers also write instructions in the communication logs. Some stores have a nightly checklist posted. The checklist lists tasks such as filling supplies, sanitizing machines, scales, wrap stations, sinks, and drains, washing trays and platters, leveling the meat cases, and filling specials, etc.

The meat department has a “cutting list,” that is prepared by whoever is cutting the meat, which may be the meat department manager, the assistant meat department manager, or the meat cutter. The meat department managers may assign a meat cutter to cut a box of pork or beef. Sometimes the meat cutters notice that certain items need to be cut and proceed to cut them, even though the items are not on the cutting list. Sometimes customers request a special order. Meat department manager Paul St. Pierre testified that this happens three to four times a week, that some require a certain finesse, and that he assigns them to the person who would do the best job. Former meat department manager Milton Michaud<sup>9</sup> testified, however, that he did not wait until a better meat cutter was available to perform such tasks. Either he or any meat cutter who noticed a customer request written in the special order book would take care of it. Two meat cutters, Steven Candela and Robert Appleton, also testified that their meat department managers do not delegate special orders and that whoever is available takes care of them.

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<sup>7</sup> The meat department managers work five days a week, 42 hours out of the approximately 105 hours per week that the stores are open, so that they are only present about 40 percent of the time.

<sup>8</sup> The communication logs submitted into evidence include orders to perform tasks such as cleaning the service case, filling specials, checking codes (expiration dates), weighing various types of meats, etc.

<sup>9</sup> Michaud was a meat department manager at Big Y for seven years before he retired 13 months ago. His last assignment was in Southbridge, where he was meat department manager for two-and-a-half years.

### Authority to schedule employees

The meat department managers are responsible for scheduling meat department employees. Most of the stores are open from 7 a.m. to 10 p.m., although there is some variation. Each week the store managers make a projection regarding the week's sales and, based on that projection, allocate a certain number of hours to each department. The department managers, including the meat department managers, schedule the employees in their department based on the hours allocated to them, availability of employees, needs of the department, and job skills. The meat manager determines what days of the week and what hours employees will work, within certain parameters. They must schedule full-time employees for 40 hours, including one night until 8 p.m., and schedule themselves for 42 hours. They try to accommodate employees who have asked for a particular day off. The store managers review the schedules, but change them only infrequently. The meat department manager gives the scheduling form to the TDM, who enters the information into a computer and generates a "crew sheet" that sets forth the schedule and is posted in the department.

Meat department managers approve vacation requests and other requests for time off by part-time employees in their department, without approval by a higher authority.<sup>10</sup> In the case of summer vacations for full-time employees and meat department managers, the meat department managers submit a form showing requested vacation weeks to the store managers. The department employees try to work it out among themselves so there is adequate coverage. The store manager and the district manager must approve the summer vacation requests. At other times of the year, the meat department manager has authority to approve requested vacation weeks.

If meat department employees need to call in sick or leave early, they are to clear it with the meat department manager or assistant meat department manager, if present, or the store manager, if the meat department manager is not present. Sometimes employees ask the person on the night crew to leave a note for the meat department manager to the effect that they will not be in the next day.

Hogan testified that meat department managers may authorize overtime work without the approval of the store manager, although such overtime work is minimal. St. Pierre and Michaud testified that they would obtain the permission of their store managers, if present, before assigning work on an overtime basis. If their store managers were not available to ask, they would assign overtime work at their discretion and live with the consequences. St. Pierre testified that he has assigned overtime without prior approval in some circumstances and that he determines who gets it. Bosse testified that at weekly store meetings, his store manager has asked the department managers to cut back on overtime hours that were scheduled for certain employees, if things are slow. There is no evidence that meat department managers have authority to assign mandatory overtime.

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<sup>10</sup> Store manager Curtis testified that employees ask their department manager for a day off, but Curtis must approve it in some cases.

Meat department employees are supposed to check with the meat department managers prior to taking a break, although two meat department employees testified that sometimes they just inform another employee that they are going on break, and it is not a problem. The meat department managers may change the time of a break if the store is busy. If the meat department manager is not present, the assistant manager determines breaks. In the absence of a manager or assistant manager, the employees work it out among themselves.

#### Authority to hire

Hebert testified that the meat department managers and TDMs at each store are responsible for hiring meat department employees. TDMs obtain a list of openings from the meat department managers and then select candidates from Big Y's computerized job application system. The TDMs conduct a prescreening interview and, if the candidate is appropriate, call in the meat department manager to participate in the second part of the interview. The meat department manager fills out an applicant rating form. The meat department manager makes the decision to hire or not to hire applicants. Meat department applicants are never hired if they are rejected by the meat department manager. If the meat department manager wants to hire the applicant, the TDM completes the necessary paperwork. Hebert testified that meat department managers have had responsibility for interviewing and hiring employees since June 2000, at the time they were changed from hourly to salaried employees.<sup>11</sup> Since that time, department managers have attended training programs in which this hiring process is described and the department managers are told that they have authority to decide who will be hired in their departments.

Michael Dooley, who was previously the store manager in Spencer,<sup>12</sup> testified that two part-time meat clerks whose names he could not recall were hired for the meat department while he was there.<sup>13</sup> He testified that meat department manager Jablonski would have been involved in the second half of their interviews, and Dooley would have let Jablonski make the final decision to hire or not to hire them.

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<sup>11</sup> Three witnesses testified on behalf of the Union that they were hired as meat cutters by a store manager or district manager in 1989 and 1991 and that the meat department manager was not involved in the hiring process. One of them, who worked as a meat department manager from 1991 to 1998, testified that he had no authority to hire when he was a meat department manager and never hired anyone. After this testimony, Hebert testified that the meat department managers were first given authority to hire in June 2000.

<sup>12</sup> Dooley was the store manager in Spencer, where Jablonski works, for two years until he became the store manager in Southbridge eight months ago.

<sup>13</sup> Big Y did not submit any documentary evidence concerning these hires, nor was there any testimony as to when these employees were hired.

Chris Atter was the store manager in Worcester/May Street at a time when Kevin Valeri was the meat department manager.<sup>14</sup> He testified that Valeri sat in with the store's TDM at the second interview of job applicants for the meat department and made the final hiring decision. Big Y submitted into evidence four job applications from the year 2000 on which the TDM filled in Valeri's name on the "hired by" line, as well as one applicant rating form apparently completed by Valeri in January 2001. Atter also testified that when he was the store manager in Spencer, Doug Jablonski made the final hiring decisions for his department, but he gave no examples of anyone hired by Jablonski.

Former meat department manager Milt Michaud testified with respect to hiring that he would tell the store manager or TDM when he needed a position filled. They would prescreen candidates and have him interview them. Afterwards, he gave his recommendation to the store manager or TDM. They hired the applicants he recommended and did not hire those he did not recommend. Meat clerk Ross Dupuis was hired using that process in December 2000, and Michaud's name appears on the "hired by" line on his job application.

Meat department manager St. Pierre testified that it is his understanding that he is to sit in on the second part of job interviews and that he has the final say as to whether or not an applicant is hired. His understanding of his authority is based on department manager training he received in 2001. There is no evidence that St. Pierre has ever hired any employees and no evidence as to whether there has been any hiring in the meat department in either Southbridge or Holden during his tenure as meat department manager at those stores over the last two years.

Meat department manager Bosse, who has served as a meat department manager in both Holden and Southbridge, testified that he attended the department manager training that included the area of hiring, but he has never hired anyone and has no authority to hire. He has never interviewed a candidate himself and never filled out an applicant rating form. He once sat in on an interview along with store manager Lowell Curtis. Curtis asked most of the questions. He testified that after the interview, he and Curtis decided to take a chance on the candidate, but later testified that Curtis made the final decision to hire him. The record does not reveal when this incident occurred.

Big Y presented no specific evidence that any of the five current meat department managers, other than Jablonski, has ever hired an employee, nor did BigY present any specific evidence that any meat department manager, current or former, has hired or rated anyone more recently than January 2001. The record does not reveal whether any new employees have been hired into any of the meat departments in the five stores at issue in the last two years, and, if so, who made the decision to hire them.

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<sup>14</sup> Atter was the store manager at May Street for two years until he became store manager in Holden in July 2002. Valeri recently left his position.

### Authority to evaluate

Meat department managers participate in periodic written evaluations of meat department employees. New employees are evaluated after six months. After that, employees may be evaluated on a six-month, nine-month, or twelve-month cycle, depending on several factors, including their rate of pay.

When evaluations are due, the meat department managers complete a performance evaluation form in which they rate employees with respect to numerous criteria as “unsatisfactory,” “development needed,” “developing,”<sup>15</sup> “accomplished,” “exceptional,” or “outstanding.”<sup>16</sup> Then, at the bottom of the form, they rate the employees’ overall performance using one of those same ratings.<sup>17</sup> The meat department managers sign the evaluation forms on the line for “supervisor,” and the store managers sign them on the line for “reviewed by.” The meat department managers review the evaluations with the employees. It is unclear from the record whether the store managers sign the evaluations before or after the meat department managers present them to the employees.<sup>18</sup>

Three store managers, one current meat department manager, and one former meat department manager testified that store managers do not instruct the meat department managers how to rate the employees, nor do they change their ratings. Former meat manager Steven Candela<sup>19</sup> testified that once, at the request of his store manager, he changed a rating to show that an employee needed improvement in an area,

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<sup>15</sup> A rating of “developing” may be used in an evaluation of a new hire or in an employee’s first evaluation after promotion to a new position.

<sup>16</sup> Big Y submitted into evidence 56 evaluations performed by meat department managers between 1999 and 2003.

<sup>17</sup> Store managers Curtis and Atter, former meat department manager Milton Michaud, and current meat department manager Paul St. Pierre testified that it is the meat department manager who completes the overall performance section on the performance evaluation form. Meat department manager Roland Bosse testified that he rates employees on the individual criteria but normally leaves the overall performance rating section blank. Big Y submitted into evidence eight evaluations completed by Bosse. In three of them, the overall performance rating was left blank, and in five of them, the overall rating section was completed, although the record does not reveal whether it was Bosse or his store manager who filled it in.

<sup>18</sup> For example, store manager Lowell Curtis testified that he saw and signed an evaluation “after it was written,” but did not clarify whether he signed it before or after it was presented to the employee. Former meat department manager Milton Michaud testified that his store manager normally signed evaluations after the review was “done,” but did not clarify whether that meant after the review was written or after it was given to the employee.

<sup>19</sup> Candela was a meat manager from 1991 to 1998 and is currently a meat cutter.

even though Candela felt the employee was doing a very good job. In another instance, meat department manager Roland Bosse gave employee Jason Driver a rating of “developing” with respect to three criteria in his 2002 evaluation. Store manager Chris Atter told Bosse that a rating of “developing” may be used only for an employee’s first evaluation. According to Atter, he told Bosse to re-rate Driver in those areas as he saw fit. According to Bosse, Atter told him give the employee a “development needed” rating for those criteria, which he did. There were no other examples given regarding instances in which a store manager told a meat department manager to change a rating.

Each performance evaluation is accompanied by a “wage administration adjustment form,” which is also signed by the meat department manager and store manager. This form includes a section that indicates the employee’s overall performance rating (Area 6 on the form), current and proposed rate of pay, and date of next review.<sup>20</sup> Employees who receive an overall rating of “unsatisfactory” or “development needed” do not receive a raise. Employees who receive an overall rating of “developing,” “accomplished,” “exceptional,” or “outstanding” receive the same full wage increase at the time of their evaluation.<sup>21</sup>

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<sup>20</sup> There appear to be different practices regarding who physically fills in the overall performance rating section in Area 6 of the wage administration adjustment form, although it appears that it is generally simply transposed from the overall rating given on the performance evaluation form. Meat department manager Paul St. Pierre testified that he fills in Area 6 himself. Two store managers testified that their meat department managers fill in that section. With respect to evaluations completed by meat department manager Joe Ricardi, store manager Curtis testified that he completed Area 6 based on the overall rating Ricardi gave on the performance evaluation form. With respect to two evaluations completed by meat department manager Roland Bosse, in which Bosse left the overall rating on the performance evaluation blank, Curtis testified that in one case he completed Area 6 based on the individual ratings that Bosse gave for the various criteria, and that in the other case he checked off “accomplished” in Area 6 based on a discussion with Bosse in which they agreed on that overall rating. Bosse testified that he does not recall discussing the matter with Curtis and that he only signs and dates the wage administration adjustment form and does not complete any other part of the form. Former meat department manager Steve Candela testified that his store manager filled in the overall rating on the wage administration adjustment forms. This was presumably based on the overall rating Candela would have given in the performance evaluation.

<sup>21</sup> Big Y has a wage scale that presumably establishes the precise amount of the standard raise for each position. It appears that Big Y occasionally grants raises above the standard amount, but that such raises must be approved by a higher manager than the department or store manager. Former meatcutter Steven Wardzala testified that his store manager, Michael Dooley, had promised him a raise of \$1.25 instead of the \$.45 he received after his review, that two meat department managers, Doug Jablonski and Kevin Valeri, told him that they had no control over the matter, and that Dooley told him he had to speak to district manager Bill Hogan about the increase. Hebert testified that a raise of that size, which is larger than the standard amount, would have required approval above the level of store manager. Similarly, former meat department manager Michaud testified that he once recommended to his store manager that an employee receive a \$2 raise instead of the usual \$.60 increase. The request was eventually approved by district manager Bill Hogan.



In addition, those employees who receive an overall rating of “exceptional” are rewarded by reducing the time to their next evaluation by 25 percent, and employees who receive an overall rating of “outstanding” are rewarded by reducing the time to their next evaluation by 50 percent.<sup>22</sup> For example, if employees who are scheduled to be reviewed annually receive an “exceptional” rating, their next review will take place in nine months rather than a year. If employees who are scheduled to be reviewed annually receive an “outstanding” rating, their next review will take place in six months rather than a year. This means that they will be eligible for another raise sooner than they otherwise would have been.<sup>23</sup>

### Authority to discipline

Big Y has a progressive discipline system under which meat department managers have authority to issue low-level discipline. Big Y offers training regarding disciplinary authority to all newly appointed department managers, including meat department managers, twice a year. The five current meat department managers in the petitioned-for stores have all attended the training.

Big Y maintains a progressive discipline counseling guideline that lists various types of offenses as “Group I,” “Group II,” or “Group III” violations and describes the suggested level of discipline for each grouping, depending on the number of offenses. The disciplinary options include verbal counseling, first written counseling, second written counseling,<sup>24</sup> decision making leave (DML), suspension,<sup>25</sup> and termination. The

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Hebert testified that somewhat different rules apply to employees who have reached the top of the wage range for their positions. They may receive a raise called a “performance premium,” even though they have reached the top of the wage scale for their job. Those who receive an “exceptional” or “outstanding” rating receive the full premium. She testified that those who receive an “accomplished” rating receive 50 percent of that amount, although the evaluations of some employees in this category note “hold” in the section for proposed rate of pay.

<sup>22</sup> Hebert testified that the reduction in time to the next evaluation is not automatic and that the store manager and meat department manager put in the date for the next review. Big Y’s Wage Administration Policy and Procedure Guide, however, states that employees who receive an “exceptional” or “outstanding” rating will automatically have their next evaluation cycle reduced by the stated percentages. Big Y submitted into evidence numerous evaluations in which a reduced evaluation cycle resulted from an overall rating of “exceptional” or “outstanding.”

<sup>23</sup> By way of example, employees Marc Manual and Shelley Guiguere, whose next reviews were held in nine rather than twelve months as a result of an overall rating of “exceptional,” received \$208 in additional wages as a result of the speed-up in their reviews.

<sup>24</sup> Under the current version of the guidelines, a verbal counseling is now referred to as “reminder 1,” a first written warning is called “reminder 2,” and a second written counseling is called “reminder 3.” Since the disciplinary records submitted into evidence use the old terminology, that is what I shall use here.

guidelines explain that, in addition to the nature of the offense, other factors considered in imposing discipline are the seriousness of the offense, the employee's past record, longevity, information from employees and witnesses, total impact on the department, and other relevant factors. The guidelines note that Big Y retains discretion to impose more or less severe discipline than may be called for by the guidelines, which may include omitting counseling steps.<sup>26</sup>

Department managers, including meat department managers, have authority to issue verbal counselings, first written counselings, and second written counselings on their own.<sup>27</sup> Hebert testified that they are supposed to check employees' personnel files for prior discipline before imposing further discipline.<sup>28</sup> The store managers review and sign the counseling records after the meat department managers complete them.<sup>29</sup> Big

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<sup>25</sup> DML refers to one day of paid leave, during which the employee writes an Action Plan describing his plan to correct the problem for which he has been disciplined. Alternatively, Big Y may impose an unpaid suspension for a certain number of days, in which case the employee must complete an Action Plan on his first day back to work. Big Y may also suspend an employee pending investigation of a serious policy infraction. If the case is dropped after investigation, the suspended employee is entitled to immediate reinstatement with back pay.

<sup>26</sup> The guidelines state that any decision making leave, unpaid suspension, termination, or deviation in the guidelines generally will be jointly determined by the area director/district manager, store/support center manager and an employees services representative at their sole discretion. Notwithstanding the reference to "deviation in the guidelines generally," Hebert testified that this sentence refers only to DMLs, suspensions, and terminations, i.e., Big Y does not require higher level managers to approve deviations from the guidelines in the case of lesser discipline.

<sup>27</sup> There was one instance in which store manager Lowell Curtis told meat department manager Roland Bosse to discipline meat clerk Jason Driver, based on a customer complaint, which he did. Apart from that incident though, there was ample testimony that meat department managers generally have authority to issue or to refrain from issuing verbal and written counselings on their own. In one instance, store manager Dave Peichota told Kevin Valeri to "write up" an employee, but Valeri refused because there were extenuating circumstances. Michaud testified that he decided what level of discipline to impose. He had the discretion to give a verbal counseling or a first written counseling for a first group one violation. He also had the discretion to issue discipline for offenses not listed in the guidelines or to make the decision not to discipline at all. His store manager would review and sign the form but would not change the level of discipline imposed.

<sup>28</sup> Former meat department manager Michaud testified that he would check employees' personnel files for prior discipline before reaching his decision. Meat department manager Roland Bosse testified that as far as he knows, he does not have access to personnel files. Store manager Lowell Curtis testified that Bosse has access to the personnel files, which are kept in the store manager's office, and the training materials and counseling record form itself indicate that the individual who issues the discipline is supposed to document any prior incidents.

<sup>29</sup> Most of the nine witnesses who testified about discipline did not state whether the store managers review and sign the counseling records before or after the meat department managers present them to the employee who is being disciplined. Store manager Curtis, however, testified

Y's disciplinary guidelines state that all counseling sessions, except for verbal counseling, should be conducted by the employee's immediate supervisor and the next higher level supervisor. Nonetheless, store manager Michael Dooley testified that he does not sit in on counseling sessions involving verbal counselings or first or second warnings, which are conducted only by the meat department manager.

Big Y submitted into evidence five counseling records issued by current meat department managers Roland Bosse and Joseph Ricardi, and 23 counseling records issued by former meat department managers Kevin Valeri, and Milton Michaud.<sup>30</sup> Meat department manager Paul St. Pierre testified that he has never had occasion to discipline an employee, but it is his understanding, based on his training, that he has discretion to impose verbal and first and second written counselings and that he does not need to check with anyone before doing so. There is no evidence that meat department managers Jablonski and Nowak have ever issued discipline.

Meat department managers do not have authority to impose a DML, or to suspend or terminate employees. They may bring to the attention of their store manager that a meat department employee has committed an infraction that warrants a DML, but store managers must consult with their employee services specialists once proposed discipline rises to that level, and the district manager makes the final decision with respect to all DMLs, suspensions, and terminations. According to Big Y's disciplinary guidelines, a DML or unpaid suspension is warranted after one Group II violation or any fourth Group I violation, and termination is warranted after any Group III violation or any fifth Group I violation. Store manager Lowell Curtis testified that Big Y has a set procedure regarding the level of discipline imposed and that it is "automatic." As noted above, however, the guidelines also provide that more or less severe discipline may be imposed than would be called for by the guidelines, in the sole discretion of Big Y. Big Y presented no evidence that counseling records issued by meat department managers have ever formed the basis for a subsequent DML, suspension, or termination.

#### Authority to effectively recommend promotion

Hogan testified that meat managers make recommendations for promotion to their store managers. All promotions must be approved by a district manager. Hogan testified that Kevin Valeri, former meat department manager for the Worcester/Sunderland Road store, recommended to store manager Joe Cavanaugh that meat department employee Paul Prunier be promoted from one classification to another and that Prunier was thereafter promoted and received a substantial jump in pay. Hogan was unclear as to whether Cavanaugh interviewed Prunier before giving him the raise, but testified that Cavanaugh knew who he was.

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that he reviews them before the meat department manager presents them to the employee, and store manager Chris Atter testified that he reviews and signs them afterward.

<sup>30</sup> Two of these were issued by Michaud at a store that is not one of the petitioned-for stores.

In December 2001, meat department manager Joe Ricardi recommended to store manager Chris Atter that employee Reinaldo Lugo be promoted from part-time to full-time. Atter testified that he spoke with his district manager, Bill Hogan, to inquire if he could add a full-time employee to the department, and Hogan approved the change. On another occasion meat department manager Kevin Valeri persuaded his store manager to promote an employee named Glen from a part-time position in the seafood department to a full-time position in the meat department.

### Secondary indicia

The meat department managers order the meat from Big Y's warehouse and are responsible for inventory control. The meat department managers are responsible for adhering to a budget prepared by Big Y's corporate office and for the performance of their department with respect to sales, gross profit, performance, labor costs, and "shrink." They do not set the prices for the meat.

Meat department managers are evaluated periodically by the employees in their department on a "Leadership Performance Index." They lead quarterly meetings for the store's meat department employees and are responsible for making a presentation at Big Y's operations meeting every 18 months.

Meat department managers are salaried, while the rest of the meat department employees are hourly paid. As salaried employees, the meat department managers are paid differently in certain respects. They are eligible for a premium when they work on Sundays that other meat department employees do not receive. When the stores close early due to snow, salaried employees such as meat department managers are paid for the whole day, while hourly employees are not. Meat department managers are eligible for a bonus of up to \$2000 if their department performs within its budget, while the other meat department employees are not eligible for this bonus. As salaried employees, meat department managers are eligible for more generous disability and life insurance benefits than the other meat department employees. Unlike the hourly employees, they do not receive overtime pay.

Meat department managers spend about 90 percent of their time performing unit work such as cutting and wrapping meat. All meat department employees, including the managers, wear the same uniform: hats and long white coats. All meat department employees wear badges with their names, but only the managers' badges indicate their title.<sup>31</sup> Each meat department has a photograph of the department manager on the wall with name and title. Meat department employees are required to check off a "crew sheet" when they arrive and leave for their shift, but meat department managers are not required to do so.

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<sup>31</sup> Hogan was unsure if the assistant meat department managers' badges indicate their title.

## **Conclusion**

Pursuant to Section 2(11) of the Act, the term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. Chicago Metallic Corp.<sup>32</sup> The status of a supervisor under the Act is determined by an individual’s duties, not by his title or job classification. New Fern Restorium Co.<sup>33</sup> The burden of proving supervisory status rests on the party alleging that such status exists. NLRB v. Kentucky River Community Care<sup>34</sup> The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. Quadrex Environmental Co.<sup>35</sup>

I find that the meat department managers are statutory supervisors by virtue of their authority to evaluate, to hire, and to schedule the hours of the employees in their departments. The Board has held that authority to perform evaluations confers supervisory status, where the evaluations are the product of the independent judgment of the evaluator, and there is a direct correlation between the evaluations and merit increases. Bayou Manor Health Center, Inc.<sup>36</sup> Here, the record shows that the meat department managers are responsible for rating the meat department employees on several individual criteria and that most, if not all of them, also give the employees an overall performance rating on the evaluation form.<sup>37</sup> Then, either the meat department manager or the store manager transposes that overall rating to the wage administration adjustment form. Although the store managers review and sign the evaluations, and it is unclear whether that occurs before or after the evaluation is presented to the employee, the record is clear that store managers do not instruct the meat department managers how to rate the employees and rarely, if ever, change the ratings given by the meat department

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<sup>32</sup> 273 NLRB 1677, 1689 (1985).

<sup>33</sup> 175 NLRB 871 (1969).

<sup>34</sup> 532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001).

<sup>35</sup> 308 NLRB 101, 102 (1992).

<sup>36</sup> 311 NLRB 955 (1993).

<sup>37</sup> With the exception of Roland Bosse, there was un rebutted testimony that it is the meat department managers who determine the overall rating. Assuming that Bosse himself does not check off an overall performance rating on the evaluation form, his store manager, Lowell Curtis, gives an overall rating based on the ratings that Bosse gives for the individual criteria.

managers.<sup>38</sup> Hillhaven Kona Healthcare Center<sup>39</sup> (evaluators are supervisors where there is no evidence that a higher manager independently investigates the basis for their evaluations or changes the ratings assigned). Finally, depending on the overall performance rating given by the meat department manager, the employees may receive a particular wage increase or no increase,<sup>40</sup> and may also be given the opportunity to receive a further wage increase sooner rather than later. In sum, the meat department managers exercise independent judgment in completing evaluations, and Big Y relies on the evaluations to award specific merit increases.

I also find that the meat department managers' authority with respect to hiring confers supervisory status. Although there is no record evidence that any meat department manager, current or former, has actually hired anyone since the year 2000, and, unfortunately, it is unclear why,<sup>41</sup> there was un rebutted testimony that meat department managers have interviewed and recommended the hire of job applicants and that their recommendations were uniformly followed without any independent investigation by higher managers.<sup>42</sup> Opelika Foundry<sup>43</sup> (individual was a supervisor, where no one was hired for his shop without interviewing with him and he had approval or veto power over their employment); see also, Brown Transport Corp<sup>44</sup> and Chemical

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<sup>38</sup> Out of the numerous evaluations completed by meat department managers in the last few years, the Union could point to only two instances in which a store manager asked a meat department manager to alter a rating, and one of those cases merely involved pointing out a technical error, in that Bosse gave a "developing" rating, which may only be used for an employee's first evaluation, to an employee who was beyond that stage.

<sup>39</sup> 323 NLRB 1171 (1997).

<sup>40</sup> While it is true that employees occasionally receive increases larger than the standard amount that must be approved by the district manager, that does not negate the fact that meat department managers have the power to grant or withhold the standard increases at issue for most employees.

<sup>41</sup> The record does not reveal whether that is because there have been no new hires in the meat departments at these five stores in the last two years, which seems unlikely, or because Big Y simply failed to introduce evidence of more recent hiring.

<sup>42</sup> The TDMs, who also interview the job applicants, are not the superiors of the meat department managers, and they merely screen the candidates for the meat department managers, who have the final say. Although meat department manager Bosse testified that he once sat in on an interview with his store manager, who made the final hiring decision, the record does not reveal when that incident occurred. It may have occurred before 2000, when hiring authority was first conferred on the meat department managers. In any event, with that one exception, there was ample testimony that under the current scheme, meat department managers are the highest level managers to interview job candidates.

<sup>43</sup> 281 NLRB 897, 900 (ALJD) 1986.

<sup>44</sup> 296 NLRB 552, 553 n. 10 (1989).

Solvents Inc.,<sup>45</sup> in which the Board found individuals to be supervisors where they were the only persons to interview applicants who were subsequently hired. Cf. Ryder Truck Rental, Inc.<sup>46</sup> (individuals who sometimes participate in interviewing candidates for employment do not have authority to effectively recommend hiring, where an admitted supervisor also interviews such applicants).

I find that the meat department managers' power to schedule the hours of employees in their department also confers supervisory status. In this regard, they schedule the employees for work on a weekly basis and, although the store managers review the schedules, they change them only infrequently. With the exception of the summer vacation period, the meat department managers approve vacation requests and other requests for time off without approval by a higher manager. DST Industries.<sup>47</sup> (individuals who have approved vacation requests without consulting their superiors are supervisors). Finally, while secondary indicia are insufficient by themselves to establish supervisory status, they may support a finding of such status where there is evidence that the individuals at issue possess Section 2(11) authority. Here, the meat department managers' status as supervisors is supported by the fact that, unlike the rank-and-file employees, they are salaried and eligible for bonuses and more generous benefits.

In reaching this conclusion, I do not rely on Big Y's contention that the meat department managers are supervisors by virtue of their authority to discipline. The meat department managers have no authority to issue a DML or to suspend or terminate employees. Their authority is limited to issuing verbal and written counselings which, by themselves, do not constitute discipline. Illinois Veterans Home at Anna L.P.<sup>48</sup> (personnel action forms/warnings are not themselves a form of discipline).

Further, the Board has found that authority to issue such warnings does not confer supervisory authority, where they have no clear connection to more serious disciplinary measures. Thus, in Green Acres Country Care Center,<sup>49</sup> the Board found no supervisory status where an employer's disciplinary policy did not specify what was required to move from the first step (verbal warning) to the next step (written warning) and beyond (suspension and discharge), i.e., there was no evidence that after receiving a verbal warning for violation of a rule, an employee would automatically progress to a written warning and suspension for the second and third infractions respectively, and, further, the employer reserved its right in the policy to use its discretion to terminate employment

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<sup>45</sup> 331 NLRB 706, 717 (2000).

<sup>46</sup> 326 NLRB 1387 n. 9 (1998).

<sup>47</sup> 310 NLRB 957, 958 (1993).

<sup>48</sup> 323 NLRB 890 (1997).

<sup>49</sup> 327 NLRB 257 (1998).

without prior warning for any reason. Cf. Concourse Village, Inc.,<sup>50</sup> where the employer's express policy provided that receipt of three written warnings automatically resulted in termination. Here, Big Y's disciplinary guidelines do suggest that more severe discipline be imposed after a certain number or type of offenses, but, as in Green Acres Country Care Center, Big Y has reserved to itself a great deal of discretion, noting that many factors are to be considered in imposing discipline and that it retains discretion to impose more or less severe discipline than may be called for in the guidelines, including omitting counseling steps. Further, there is no evidence that counseling records issued by meat department managers have ever formed the basis for a DML, suspension, or termination. In these circumstances, I find that there is an insufficient nexus between the meat department managers' power to issue counseling records and any subsequent personnel action to support a finding of supervisory status.

Nor do I rely on Big Y's contentions with respect to the other supervisory indicia. As for the meat department managers' role in recommending promotions, the authority effectively to recommend means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed. Children's Farm Home.<sup>51</sup> Big Y asserts that three promotional recommendations by meat department managers were followed, but it presented no evidence that the store managers and district manager who approved each recommendation did so without conducting an independent investigation of the matter. Consolidated Services; Brown and Root, Inc.<sup>52</sup> Big Y has failed to demonstrate that the meat department managers' role in assigning tasks requires independent judgment, as there is little evidence that such assignments are based on differing skill levels among employees. The authority to approve breaks has been found to be a routine clerical judgment that does not require the exercise of independent judgment. Loyalhanna Care Center; Youville Health Care Center, Inc.<sup>53</sup> It appears, in any event, that some employees simply notify their meat department manager that they are going on break and that employees simply work out breaks among themselves in the absence of the meat department manager, which is most of the time. The meat department managers' authority to assign overtime work does not confer supervisory status, where overtime work is minimal and they obtain the permission of their store managers first, if possible. Further, there is no evidence that they can compel employees to work overtime. Riverchase Health Care Center.<sup>54</sup> Big Y gave no examples where a meat department

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<sup>50</sup> 276 NLRB 12, 13 (1985).

<sup>51</sup> 324 NLRB 61 (1997).

<sup>52</sup> 321 NLRB 845 (1996).

<sup>53</sup> 314 NLRB 19, 21 (1994).

<sup>54</sup> 332 NLRB No. 86, slip op. at 3 (2000).

<sup>55</sup> 326 NLRB 495, 496 (1998).

<sup>56</sup> 304 NLRB 861, 864 (1991).



manager denied an employee permission to leave early to take a sick day. Discretion to grant or deny permission to leave early is, in any event, insufficient to confer supervisory status. Northcrest Nursing Home.<sup>57</sup>

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time meat department employees employed by Big Y Foods, Inc. at the following Massachusetts stores: Southbridge, Spencer, Holden, May Street in Worcester, and Sunderland Road in Worcester, including assistant meat department managers, meat cutters, and meat clerks, but excluding meat department managers, guards, and supervisors as defined in the Act.

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date, and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for purposes of collective bargaining by United Food & Commercial Workers International Union Local 1445, AFL-CIO, CLC.

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<sup>57</sup> 313 NLRB 491, 505 (1993), citing Kent Products, 289 NLRB 824 (1988).

## **LIST OF VOTERS**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc.;<sup>58</sup> NLRB v. Wyman-Gordon Co.<sup>59</sup> Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligibility list containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director, who shall make the list available to all parties to the election. North Macon Health Care Facility.<sup>60</sup> In order to be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before April 14, 2003. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

## **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by April 21, 2003.

/s/ Rosemary Pye  
Rosemary Pye, Regional Director  
First Region  
National Labor Relations Board  
Thomas P. O'Neill, Jr. Federal Building  
10 Causeway Street, Sixth Floor  
Boston, MA 02222-1072

Dated at Boston, Massachusetts  
this 7th day of April 2003.

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<sup>58</sup> 156 NLRB 1236 (1966).

<sup>59</sup> 394 U.S. 759 (1969).

<sup>60</sup> 315 NLRB 359 (1994).